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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 1012

AUGUSTA HILL and MAMIE HILL,
Petitioners,

vs.

LEWIS M. GREGORY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Augusta Hill and Mamie Hill, pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit affirming an order of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing their complaint in a civil action founded only on diversity of citizenship for lack of jurisdiction.

OPINIONS BELOW.

The opinion of the United States Court of Appeals and the opinion of the United States District Court have not been published. The opinion of the Court of Appeals is set out as Appendix "A". The opinion of the District Court is set out as Appendix "B".

JURISDICTION.

The decision of the Court of Appeals was filed February 26, 1957.

The jurisdiction of this Court is invoked under 28 U.S.C. 2101 (c), 28 U.S.C.A. 2101 (c).

QUESTION PRESENTED.

Whether the defendant in this case, which is a civil case founded only on diversity of citizenship which is admitted, who when sued was and had been living and employed full time in private enterprise for a period of 4½ years in the Northern District of Illinois, a judicial district of the State of which he is, according to the complaint, a citizen, which allegation is not denied, by reason of said facts alone or in conjunction with other undisputed facts of record, is as a matter of law a resident of the Northern District of Illinois for venue purposes under 28 U.S.C. 1391a, exclusively or otherwise.

STATUTES INVOLVED.

The statutes involved are 28 U.S.C. 1332 (a)(1) and 1391 (a), 28 U.S.C.A. 1332 (a)(1) and 1391 (a).

28 USCA Sec. 1332 (a)

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> "(1) Citizens of different States:"

28 USCA Sec. 1391 (a)

> "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

STATEMENT.

Petitioners are members of the colored race and citizens and residents of Wisconsin. On July 9th, 1955, they were involved in an automobile collision with an automobile driven by respondent on a highway near New Albany, Mississippi. Respondent was living in the City of Aurora, Kane County, Illinois, in the Northern District of Illinois. Plaintiffs sued him and served process on him in the United States District Court for the Northern District of Illinois, Eastern Division, for damages for the injuries they had sustained as a result of his negligence. They alleged their own citizenship and residence in Wisconsin and respondent's citizenship in Illinois and residence in the City of Aurora, Kane County, Illinois (in the Northern District of Illinois). Respondent filed a motion to dismiss, contending only that he was a resident of New Albany, Mississippi (in the Northern District of Mississippi) and was not a resident of Illinois (and the Northern District of Illinois). He did not deny that he was a citizen of the State of Illinois.

The facts are undisputed. The Court of Appeals states them in its opinion which restates them as stated in the opinion of the district court. Respondent was

> "born in New Albany, Mississippi, and lived there until 1951 when he made a trip to visit friends residing in Aurora, Illinois; that due to financial conditions, he decided to seek temporary employment there and obtained the same with Stoner Manufacturing Company in Aurora where he has been employed to date; that he paid his poll tax in Mississippi and is a registered voter there; that in 1952 he obtained his driver's license in Mississippi, which expires in 1956; that he owns a 1955 Chevrolet which he purchased in New Albany, Mississippi and financed the same through a G.M.A.C. agency in

Tupelo, Mississippi; that during the time he has been working in Aurora he returned to New Albany on approximately thirty-five occasions, remaining there for periods of from one day to two weeks; that he maintains his residence with his uncle in New Albany, Mississippi, and keeps his personal property there; that it has always been his intention to return there and, when the accident happened, it had been his intention to remain in New Albany, but due to that event he was compelled to return to Aurora where he is able to earn more money to meet his expenses; that he lives in the Oak Grove Trailer Park in Aurora. The defendant's automobile has both Illinois and Mississippi license plates; it is registered in Illinois; the defendant has an Illinois chauffeur's license issued in 1955 which expires in 1956; his car bears an Aurora city license sticker; he has filed income tax returns in Chicago; he is not a registered voter in Illinois; the last time he voted was in Mississippi four years ago, making a special trip from Aurora to do so; he paid his Mississippi poll tax some time after Christmas 1955 or early 1956."

The trial court found that the respondent was a resident of New Albany, Mississippi, which is located in the Northern District of Mississippi, and dismissed the action. The Court of Appeals affirmed.

REASONS FOR GRANTING WRIT.

There are four reasons why the writ should be granted.

In the first place, the decision of the Court of Appeals for the Seventh Circuit in this case is in conflict with the decision of the Court of Appeals for the Tenth Circuit in *Townsend* v. *Bucyrus-Erie Co.*, (1944) 144 F. 2d 106, in which the court held that state citizenship for the purpose of conferring jurisdiction in diversity of citizen-

ship cases and residence in a judicial district for venue purposes are not necessarily one and the same thing and that one may have residence in a judicial district in a state for venue purposes while his citizenship continues in another.

In the case cited the Court of Appeals held that defendant who was a citizen of Arkansas could be sued in the United States District Court for the Northern District of Oklahoma in which she was living at the time. It said:

> "State citizenship for the purpose of conferring jurisdiction in diversity of citizenship cases under Section 24 of the Judicial Code 28 U.S.C.A. 41(1), and residence in a judicial district for venue purposes under Section 51 of the Judicial Code, 28 U.S.C.A. Section 112, are not necessarily one and the same thing—they are not synonymous, co-existent, or convertible terms. . . . One may have a residence in a state while his citizenship continues in another. . . . State citizenship and residence are however related or cognate terms and the existence of one, although not conclusive, is cogent evidence of the other. They both embody the concept of domicile or a place called home as distinguished from a transitory or temporary place of abode. . . ."

It is our contention that the foregoing is authority for the proposition that the United States District Court for the Northern District of Illinois has jurisdiction of this litigation if the proof establishes the following:

> "Plaintiffs are citizens (residents for purposes of citizenship) of Wisconsin and residents (for purposes of venue) of the Eastern District of Wisconsin, and defendant is a citizen (resident for purposes of citizenship) of Illinois or Mississippi and a resident (for purposes of venue) of the Northern District of Illinois."

although the proof also establishes that defendant is a resident (for purposes of venue) of the Northern District of Mississippi.

In other words it makes no difference whether respondent is a citizen of Illinois or Mississippi. It also makes no difference whether respondent is a resident for venue purposes of the Northern District of Mississippi. The only thing that is necessary is that he be a citizen of some State other than Wisconsin and that he be a resident for venue purposes of the Northern District of Illinois.

In passing it should be noted that decision does not stand alone. In *Canadian Pacific Ry.* v. *Wenham,* (Cir. S.D.N.Y., 1906), 146 Fed. 207, the defendant, a citizen of Illinois, was held to be a resident of New York for purposes of venue.

The Court of Appeals in the case at bar holds that state citizenship for the purpose of conferring jurisdiction in diversity of citizenship cases and residence in a judicial district for venue purposes are necessarily one and the same thing and that one may not have residence in a judicial district in one State for venue purposes while his citizenship continues in another.

This is not readily apparent because the decision of the District Court and the decision of the Court of Appeals purport to be based on a determination of residence for purposes of venue, but it becomes evident upon examination of the opinions.

In this case the United States District Court held that respondent was a resident of the Northern District of Mississippi and dismissed the action for want of jurisdiction. The Court of Appeals affirmed. Respondent's motion to dismiss was made solely on the ground that

the suit was filed in the wrong district because petitioners were residents of Wisconsin and he was a resident of Mississippi. That raised no issue of lack of diversity of citizenship and did not challenge the allegation in the complaint that he was a citizen of Illinois. *Steigleder* v. *McQueston,* (1905) 198 U. S. 141, 143; *Pioneer Southwestern Stages, Inc.* v. *Wicker,* (9 Cir., 1931), 50 F. 2d 581, 582; *Sivenson* v. *McDaniel,* (U.S.D.C. Nev.) 119 F. Supp. 152, 159.

Neither the District Court nor the Court of Appeals raised any such issue on their own motion.

The district court made no express finding that respondent was or was not a citizen of Illinois or that he was or was not a citizen of Mississippi. Nor did it make any express finding that he was not a resident of the Northern District of Illinois, treating its determination that he was a resident of the Northern District of Mississippi as a determination that he was not. By necessary inference it held that he could not be a resident of a judicial district in one state and a resident of a judicial district in another state at the same time. We say that defendant is a resident of the Northern District of Illinois because he has lived here and worked here in full time employment for 4½ years. He paid his taxes here and licensed his vehicle here. He is a resident for venue purposes as a matter of law.

Venue is not jurisdictional. *Riley* v. *Union Pacific R.* Co., (7 Cir., 1949) 177 F. 2d 673, 675. State citizenship is indivisible. *Desmore* v. *United States,* (1876) 93 U. S. 605, 610; *Shaw* v. *Shaw,* (1867) 98 Mass. 155, 160; *Depuy* v. *Wurtz,* (1873) 53 N. Y. 556, 561. It follows that state residence for purposes of citizenship is likewise indivisible.

The fact, therefore, that the District Court treated residence as being jurisdictional and indivisible, and used the words "residence" and "domicile" synonymously, shows quite clearly that while it ostensibly determined respondent's residence for purposes of venue it determined it for purposes of citizenship instead, recognizing no difference between residence for one purpose and residence for the other. Neither did the Court of Appeals since it affirmed without making a distinction.

It follows, therefore, that both courts held that state citizenship for the purpose of conferring jurisdiction in diversity of citizenship cases and residence in a judicial district for venue purposes are necessarily one and the same thing and that a person may not have residence for purposes of venue in a state other than the state of which he is a citizen.

This Court should grant certiorari to resolve the conflict between the Courts of Appeal for the Seventh and Tenth Circuits.

In the second place, this Court should grant the writ to determine the case on its merits, the facts being undisputed, and this Court being in as good a position as the district court and the court of appeals to draw any necessary inferences, since a policy decision by this Court will set a criterion by which the lower federal courts may be guided in the future in determining residence for purposes of citizenship and for purposes of venue in the event the court sustains petitioners' position and the position of the Court of Appeals for the Tenth Circuit, and the extent to which they overlap, and the nature of the proof and the weight of evidence needed to establish each type of residence, and to draw the lines of demarcation between them, there being no decision by this Court squarely in point.

In the third place there are several subsidiary questions raised by this case that should be determined. For example, are the requirements of 28 U.S.C. 1391a a jurisdictional prerequisite; and, if so, is that section applicable to a situation where the defendant does not reside in any other district in the state; and is there any valid reason why a district court should decline jurisdiction where there is a diversity of citizenship and the requisite amount involved for federal jurisdiction and place a plaintiff who has sued another in the district in which the defendant is living in a position of being out of court with all the dangers incident to that situation when if he had sued the defendant in a state court he would be in some court, state or federal, regardless of what steps were taken to transfer the case to a federal court or to remand it to a state court. These questions are important questions which ultimately will have to be decided by this Court and are conveniently all present in this case. Certiorari should be granted to decide them.

In the fourth place, we respectfully submit that respondent was properly served in this action in the Northern District of Illinois, and that he is a resident of that district, for purposes of venue and citizenship. It must be kept in mind that he could not possibly be served in the United States District Court in any other state than Illinois unless he happened to be found there on a short visit. He works and lives in the city of Aurora, Illinois. He enjoys the standard of living and the superior working conditions which he finds there in Illinois, and, according to his own testimony, he has no intention of returning to Mississippi at any particular time in the future. In view of all the circumstances, it is submitted to this Court that it would be an injustice for this respondent to be able to successfully claim, as he has to date, that

he is not subject to service in the Northern District of Illinois, and it would also be an injustice to require these two negro plaintiffs to go to the State of Mississippi to try their case when the respondent lives in the Northern District of Illinois and this transitory action can be tried there free of prejudice.

This Court is the court of last resort and should grant certiorari to save the case.

CONCLUSION.

Petitioners respectfully pray that the Court will grant this petition for a writ of certiorari to the Court of Appeals, Seventh Circuit, to review this case and decide the questions raised for the reasons therein stated.

Respectfully submitted,

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APPENDIX A.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11843 September Term, 1956 January Session, 1957.

Augusta Hill and Mamie Hill, Plaintiffs-Appellants,
v.
Lewis M. Gregory, Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 26, 1957

Before Duffy, Chief Judge, and Swaim and Schnackenberg, Circuit Judges.

Schnackenberg, Circuit Judge. Plaintiffs, residents of the state of Wisconsin, sued defendant in the United States District Court for the Northern District of Illinois, describing him as a resident and citizen of Aurora, Kane County, Illinois. Their complaint recited that the grounds upon which that court's jurisdiction depended were diversity of citizenship and the fact that the matter in controversy exceeded the sum of $3,000. The cause of action was for damages sustained by plaintiffs as the result of a collision between an automobile in which plaintiffs were riding in the state of Mississippi and an automobile then and there driven by defendant. On motion of defendant, the district court entered an order dismissing the complaint for lack of jurisdiction, from which order this appeal was taken.

On the hearing of the motion the district court considered defendant's affidavit, stating that "from the briefs it appears that the fact averments of the affidavit are not controverted." The court also stated that a deposition of defendant taken by the plaintiff had not been submitted to the court. Such deposition was filed in the office of the clerk of the district court under date of July 3, 1956. However, in the court's memorandum decision filed June 8, 1956, facts are set forth which both parties agree appeared in that deposition. This minor mystery we make no attempt to solve. For the purpose of this decision we consider all of the pertinent facts appearing in the affidavit and the deposition.

Title 28, U.S.C.A. Sec. 1391(a) provides:

> "A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

It is clear that, if defendant did not reside in the state of Illinois when this suit was filed, the court had no jurisdiction of the case.

The court relied upon the facts which we now set forth. Defendant was born in New Albany, Mississippi, and lived there until 1951 when he made a trip to visit friends residing in Aurora, Illinois; that due to financial conditions, he decided to seek temporary employment there and obtained the same with Stoner Manufacturing Company in Aurora where he has been employed to date; that he paid his poll tax in Mississippi and is a registered voter there; that in 1952 he obtained his driver's license in Mississippi, which expires in 1956; that he owns a 1955 Chevrolet which he purchased in New Albany, Mississippi and financed the same through a G.M.A.C. agency in Tupelo, Mississippi; that during the time he has been working in Aurora he returned to New Albany on approximately thirty-five occasions, remaining there for periods of from one day to two weeks; that he maintains his residence with his uncle in New Albany, Mississippi,

and keeps his personal property there; that it has always been his intention to return there and, when the accident happened, it had been his intention to remain in New Albany, but due to that event he was compelled to return to Aurora where he is able to earn more money to meet his expenses; that he lives in the Oak Grove Trailer Park in Aurora. The defendant's automobile has both Illinois and Mississippi license plates; it is registered in Illinois; the defendant has an Illinois chauffeur's license issued in 1955 which expires in 1956; his car bears an Aurora city license sticker; he has filed income tax returns in Chicago; he is not a registered voter in Illinois; the last time he voted was in Mississippi four years ago, making a special trip from Aurora to do so; he paid his Mississippi poll tax some time after Christmas 1955 or early 1956.

From these facts the district court drew the conclusion that defendant is a resident of New Albany, Mississippi.

Under rule 52(a) of the Federal Rules of Civil Procedure,[1] it is for the trial judge to determine the propriety of the inferences and conclusions to be drawn from the undisputed facts.[2] As was said in Central Ry. Signal Co. v. Longden, 194 F.2d 310, 317:

> "• • • His is the primary function of finding the facts and choosing from amongst conflicting factual inferences those which he considers most reasonable. Even where there is no dispute about the facts, if different reasonable inferences may be fairly drawn from the evidence, we are forbidden to disturb the finding based on such inferences unless they are clearly erroneous. Gaytime Frock Co. v. Liberty Mut. Ins. Co., 7 Cir., 148 F.2d 694, 696. See also Hacock v. Eck, 7 Cir., 183 F.2d 632, 635; Moths v. U.S., 7 Cir., 179 F.2d 824."

---

[1] 28 U.S.C.A. rule 52(a).

[2] Mid-Continent Pipe Line Co. v. Whiteley, 116 F. 2d 871, 874.

Applicable to this case is what we said in that case, at 318:

> "Realizing these limitations upon our functions, we have examined in detail the record submitted in this appeal and, after such examination, find it devoid of anything that would justify us in saying that the findings are erroneous. * * *"

On the facts as so found and the provisions of sec. 1391(a),[1] the district court was correct in ordering the complaint dismissed for lack of jurisdiction. Its judgment is affirmed.

Judgment Affirmed.

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[1] 28 U.S.C.A. §1391(a).

APPENDIX B.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT,

Filed June 8, 1956.

• • •

The complaint in the above cause is brought to recover for personal injuries sustained on or about July 9, 1955 in an automobile collision on a highway near New Albany, Mississippi. It is alleged that diversity of citizenship exists in that plaintiffs are residents of Racine, Wisconsin, and the defendant is a resident of Aurora, Illinois. The defendant has filed a motion to dismiss the complaint for lack of jurisdiction in that he is a resident of New Albany, Mississippi and not Illinois. To support said motion, the defendant has filed his affidavit wherein he avers that he was born in New Albany, Mississippi, and lived there until 1951 when he made a trip to visit friends residing in Aurora, Illinois; that due to financial conditions, he decided to seek temporary employment in Aurora and obtained the same with Stoner Manufacturing Company in Aurora where he has been employed to date; that he paid his poll tax in Mississippi and is a registered voter there; that in 1954 he obtained his driver's license in Mississippi which expires in 1956; that he owns a 1955 Chevrolet which he purchased in New Albany, Mississippi and financed the same through a GMAC agency in Tupelo, Mississippi; that during the time he has been working in Aurora he returned to New Albany on approximately thirty-five different occasions remaining there for periods of from one day to two weeks; that he maintains his residence with his uncle in New Albany, Mississippi and keeps his personal property there; that it has always been his intention to return there and when the accident happened it had been his intention to remain in New Albany, but due to that event he was compelled to return to Aurora where he is able

to earn more money to meet his expenses; that he lives in the Oak Grove Trailer Park in Aurora.

It appears from the briefs that the plaintiff has taken defendant's deposition, although it has not been submitted to the court. From the briefs it appears that the fact averments of the affidavit are not controverted. The following additional facts have been disclosed: the defendant's automobile has both Illinois and Mississippi license plates; it is registered in Illinois; the defendant has an Iliinois chauffeur's license issued in 1955 which expires in 1956; his car bears an Aurora City license sticker; he has filed income tax returns in Chicago. The defendant is not a registered voter in Illinois; the last time he voted was in Mississippi four years ago, making a special trip from Aurora to do so; he paid his Mississippi poll tax some time after Christmas 1955 or early 1956.

The test of residence in the district of action of a defendant found and served therein is principally one of his intent, to be deduced not from his declarations, which may lack probative value because of the circumstances under which they are made, but also from his acts and conduct and a consideration of the circumstanes under which he acted. Whether domicile was changed depends not upon proving particular facts but whether all the facts and circumstances taken together, tending to show that a man has his home or domicile in one place, over-balance all the like proofs, tending to establish it in another.

The court is of the opinion that the facts in the instant case support a conclusion that the defendant is a resident of New Albany, Mississippi. Since he has filed a suit there against these plaintiffs, for injuries sustained in the same accident, the plaintiffs herein can proceed in that action for the relief sought here. An order has this day been entered sustaining the defendant's motion to dismiss the complaint for lack of jurisdiction.

/s/ Walter J. La Buy
Judge, United States District Court

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LEWIS M. GREGORY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 1012

AUGUSTA HILL AND MAMIE HILL,
Petitioners,

vs.

LEWIS M. GREGORY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Lewis M. Gregory, submits that this Court should deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit affirming the order of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the Petitioners' complaint in a diversity of citizenship case because of improper venue.

QUESTION PRESENTED.

Whether this Court should review by certiorari the decision of the Court of Appeals holding that the District Court was not clearly in error in finding, upon conflicting evidence and inferences therefrom, that Respondent did not "reside" within the Northern District of Illinois as that term is used in the federal venue statute, 28 U.S.C. Sec. 1391(a).

STATEMENT OF THE CASE.

Petitioners instituted this action against the Respondent in the United States District Court for the Northern District of Illinois, Eastern Division, to recover damages for alleged injuries suffered by them as the result of an automobile accident occurring on a highway near New Albany in the State of Mississippi. Respondent was served with process in the District where the suit was brought. The Complaint alleged that the Court had jurisdiction under 28 U.S.C. Sec. 1332(a) on the ground that Petitioners were citizens of Wisconsin and the Respondent a citizen of Illinois and the amount in controversy exceeded $3,000.00 exclusive of interest and costs. Respondent filed a timely motion to dismiss the action on the ground it was brought in the wrong district, because all the Petitioners were residents of Racine, Wisconsin, and the Respondent a resident of Mississippi. This motion to dismiss for improper venue was supported by the affidavit of the Respondent and his deposition.

The evidence as to Respondent's residence is summarized in the opinions of the Court of Appeals and the District Court below. (Appendices A and B to the petition for certiorari). Those facts are not in dispute. The only facts in any way indicating that Respondent was a resident of of Illinois were (1) he obtained a one year Illinois

Chauffeur's License (a license respondent was legally required to procure whether he was a resident or not in order to obtain the privilege granted by the license); (2) he had 1956 Illinois and Mississippi license plates on his cars (a factor indicating the Respondent's intention to return during the year to his home and to use his automobile in Mississippi); (3) he paid an Aurora, Illinois City tax on his car and had a City sticker; (4) he filed his income tax returns with the District Director of Internal Revenue in Chicago, Illinois, and (5) he had been employed in Aurora, Illinois, for the past four and a half years. While living in Aurora Respondent lived in furnished rooms and a trailer in and around Aurora. As against these few contacts with Illinois, it is conceded and the District Court found that Respondent was born in New Albany, Mississippi, and lived there until 1951 when he made a trip to visit friends residing in Aurora, Illinois; that due to financial conditions, he decided to seek temporary employment in Aurora and obtained the same with Stoner Manufacturing Company in Aurora where he has been employed to date; he paid his poll tax in Mississippi and is a registered voter there; and is not a registered voter in Illinois; that the last time he voted was in Mississippi four years ago, making a special trip from Aurora to do so; he paid his Mississippi poll tax some time after Christmas 1955 or early 1956; that in 1954 he obtained his driver's license in Mississippi which expires in 1956; that he owns a 1955 Chevrolet which he purchased in New Albany, Mississippi and financed the same through a GMAC agency in Tupelo, Mississippi; that during the time he has been working in Aurora he returned to New Albany on approximately thirty-five different occasions remaining there for periods of from one day to two weeks; that he maintains his residence with his uncle in New Albany, Mississippi and keeps his per-

sonal property there; that it has always been his intention to return there and when the accident happened it had been his intention to remain in New Albany, but due to that event he was compelled to return to Aurora where he is able to earn more money to meet his expenses.

The District Court granted the Respondent's motion and dismissed the action for lack of jurisdiction. The Court of Appeals affirmed on the ground that under 28 U.S.C. Sec. 1391(a), the District Court's finding that Respondent was a resident of Mississippi and not a resident of Illinois was not clearly erroneous.

REASONS FOR DENYING THE WRIT.

1. *The Decision Below Is Not In Conflict With The Decision Of Any Other Court Of Appeals.*

The decision below in no way conflicts, as alleged by Petitioners, with the decision of the Court of Appeals for the Tenth Circuit in *Townsend* v. *Bucyrus-Erie Co.*, (1944) 144 F. 2d 106. The Petitioner specifically relies upon the statement in the opinion in the *Townsend* case, at p. 108, that:

> "State citizenship for the purpose of conferring jurisdiction in diversity of citizenship cases under Section 24 of the Judicial Code, 28 U.S.C.A. 41 (1), and residence in a judicial district for venue purposes under Section 51 of the Judicial Code, 28 U.S.C.A. 112, are not necessarily one and the same thing—they are not synonomous, co-existent, or convertible terms. . . . One may have a residence in a state while his citizenship continues in another."

But the Court in the *Townsend* case went on to state at pp. 108-109:

> "State citizenship and residence are however related or cognate terms and the existence of one, al-

though not conclusive, is cogent evidence of the other. *They both embody the concept of domicile or a place called home as distinguished from a transitory or temporary place of abode.*" [Emphasis added]

The District Court in the instant case applied exactly the same standard in determining Respondent's residence for venue purposes as that announced by the Court of Appeals in the *Townsend* case. The District Court merely found, after reviewing all the evidence, that the defendant was a resident of New Albany, Mississippi, and not a resident of Illinois, stating that the proper test of residence for venue purposes under 28 U.S.C. Section 1391(a) was:

> " . . . principally one of his intent, to be deduced not from his declarations, which may lack probative value because of the circumstances under which they are made, but also from his acts and conduct and a consideration of the circumstances under which he acted. *Whether domicile was changed depends not upon proving particular facts but whether all the facts and circumstances taken together, tending to show that a man has his home or domicile in one place, over-balance all the like proofs, tending to establish it in another.*" [Emphasis added]

In affirming the District Court, the Court of Appeals quoted 28 U.S.C.A. Sec. 1391 (a) and after reviewing the evidence merely held that the finding of the District Court that the defendant was a resident of Mississippi and not of Illinois was supported by the evidence.

There is not a single statement by the Court of Appeals below, let alone a holding, as to whether or not there is a distinction between the definition of "citizenship" for jurisdictional purposes and "reside" for venue purposes. The two decisions are clearly in accord as to the proper defini-

tion of "reside" for venue purposes under 28 U.S.C. Sec. 1391(a), both courts holding that the word "reside" in Section 1391(a), embodies the concept of domicile—physical presence combined with an intent to remain indefinitely.

Petitioners' contention that there is a conflict between the two cases is founded upon a structure they themselves have built. Because of the statement in the opinion of the Court below that the cause was properly dismissed for lack of jurisdiction, they argue that the Court was treating as synonymous the concepts of citizenship for purposes of diversity jurisdiction and residence for venue purposes. The Court itself, of course, did no such thing.

2. *The Proper Meaning of "Reside" in 28 U.S.C. Sec. 1391(a).*

The Petitioners suggest that this Court should grant certiorari to review the judgment below to settle an alleged uncertainty in the lower federal courts as to the proper meaning of the word "reside" in 28 U.S.C. Sec. 1391(a).

They overlook the fact that this question was long ago authoritatively determined by this Court in the case of *Shaw* v. *Quincy Mining Company*, (1892) 145 U.S. 444. This Court there stated at p. 449, in construing a statute which was a predecessor of present Section 1391(a):

> "As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship, to a

Circuit Court held in a State of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident."

The *Shaw* case has been regularly followed by the lower federal courts in this regard. See, *King* v. *Wall & Beaver Street Corporation*, (C.A.D.C., 1944) 145 F. 2d 377, where the Court stated at pp. 378-79:

"Presumably, the court was of opinion that because at the time of filing the suits and service of process the Kings were actually, though temporarily, residing in the District of Columbia, they were for that reason 'residents' within Section 51 of the Judicial Code, notwithstanding their actual citizenship in Connecticut. But it is well established that the words 'inhabitant' and 'resident in', as used in Section 51 of the Judicial Code, mean neither more nor less than legal domicile, as the result of which jurisdiction except by consent is confined to the district in the State of which one or the other of the parties is a citizen. See *Shaw* v. *Quincy Mining Co.*, 145 U.S. 444, 12 S.Ct. 935, 36 L. Ed. 768; *In re Keasbey & Mattison Co.*, 160 U.S. 221, 228, 16 S. Ct. 273, 40 L. Ed. 402; *Bicycle-Stepladder Co.* v. *Gordon*, C.C., 57 F. 529; *United States* v. *Gronich*, D.C., 211 F. 548. Cf. *Camp* v. *Gress*, 250 U.S. 308, 39 S. Ct. 478, 63 L. Ed. 997; *Putnam* v. *Ickes*, 64 App. D.C. 339, 78 F. 2d 223."

Accord, *Koons* v. *Kaiser*, (D.C. S.D., N.Y., 1950) 91 F. Supp. 511, at p. 517; *Sherman* v. *Collin*, (D.C. Me., 1953) 117 F. Supp. 496, at p. 497.

None of the cases cited by Petitioners in fact supports their argument that the concept of residence for venue purposes does not embody the concept of domicile. Several of them merely hold that the word "residence" in the abstract may not mean domicile so that an allegation that the plaintiffs or defendants reside in a particular state is not a sufficient allegation that they are citizens of that state for jurisdictional purposes. Cf. *Steigleder* v. *McQuesten*, (1905) 198 U.S. 141.

This Court having expressly passed on the question before, there is no need for the Court to lay down any further "lines of demarcation" for the guidance of the federal courts in this area.

3. *"Subsidiary Questions."*

The Petitioners argue that this Court should review the decision below to decide:

(1) whether venue requirements are jurisdictional;

(2) is there any valid reason for a District Court to decline jurisdiction where the requisite diversity of citizenship and amount in controversy is present because of lack of proper venue.

The answer to neither question is in doubt. *First*, venue requirements are not jurisdictional and may be waived, as everyone knows. *Olberding* v. *Illinois Central R. Co.*, (1953) 346 U.S. 338; *Riley* v. *Union Pac. R. Co.*, (C.A. 7, 1949) 177 F. 2d 673. *Second*, where venue is laid in the wrong district the Court is specifically authorized by statute to dismiss the suit or if it be in the interest of justice, transfer the case to the district where it should have been brought. 28 U.S.C. Sec. 1046; *Pinesich* v. *Miller*, (D.C. Pa., 1950) 89 F. Supp. 539. The District

Court herein considered the fact that there is pending a suit brought by the Respondent against Petitioners in the Federal District Court in Mississippi, for injuries sustained in the same accident, wherein Petitioners could proceed for the relief sought herein. Accordingly, nothing would be gained by transferring this case there rather than dismissing it.

CONCLUSION.

Respondent submits that the petition for certiorari filed herein is merely another attempt to have this Court review concurrent findings of fact, not clearly erroneous, of two lower federal courts. This the Court has repeatedly stated it will not do. *Pick Mfg. Co.* v. *General Motors Co.*, (1936) 229 U.S. 3. *Graver Mfg. Co.* v. *Linde Co.*, (1949) 336 U.S. 271, 275. Accordingly Respondent prays that this Court deny the petition for a writ of certiorari to the Court of Appeals of the Seventh Circuit, to review this case.

Respectfully submitted,

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